

ROBERT LACERTE
Claimant

MARKS HOMES, INC.
Respondent

AMERICAN FAMILY MUTUAL INSURANCE
Insurance Carrier

ORDER

ISSUES

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A preliminary hearing order is subject to review by the Appeals Board when the respondent raises the defense that claimant's intoxication substantially caused his injury. See K.S.A. 44-534a(a)(2), as amended by S.B. 649 (1996).

The basic facts of this case are not disputed. Claimant sustained an extremely comminuted explosion-type fracture of the right ankle on November 18, 1992 while working for the respondent. Claimant was employed as a painter and fractured his ankle when he jumped from the fifth step of a 6-foot stepladder. At the time of the accident, claimant was sanding new sheetrock on a vaulted ceiling of a new residential home in preparation for

painting. Claimant testified that the stepladder started tilting, which caused him to lose his balance. He jumped off the stepladder instead of falling with the stepladder. Claimant established that the floor of the residence contained trash and he fractured his ankle when he came down on a piece of scrap wood. Claimant testified that the stepladder remained standing after the accident.

Claimant was taken to a local hospital by two of his coworkers. He was treated in the emergency room and then referred to Dr. Richard E. Whitehead, an orthopedic surgeon. Dr. Whitehead performed surgery which consisted of an open reduction with internal fixation of the fractured ankle. The emergency room medical record indicated that the claimant appeared intoxicated with a smell of alcohol present. A blood sample was taken from the claimant and included in the preliminary hearing transcript is a blood alcohol report showing that claimant's blood alcohol level was .212 percent by weight per volume.

The respondent does not dispute the fact that claimant fractured his ankle while working for the respondent. The respondent also agreed that the claimant's ankle injury needs further medical treatment. The respondent, however, does maintain that claimant is not eligible for compensation benefits because his injury resulted "substantially from the employee's intoxication" K.S.A. 1992 Supp. 44-501(d).

The Administrative Law Judge granted claimant's request for medical treatment, thus finding that the respondent failed to prove that claimant's ankle fracture was substantially caused by his intoxication. The Appeals Board disagrees with the Administrative Law Judge and finds that the totality of the evidence presented by the respondent proves the claimant was intoxicated at the time of his accident and such intoxication substantially caused claimant's injury.

Claimant testified by deposition twice in these proceedings, July 9, 1993 and October 4, 1995. Claimant denied that he consumed alcohol on the date of his accident during the July 9, 1993 deposition. Claimant testified during the second deposition of October 4, 1995 that he had consumed 4 beers the night before the accident. On the other hand, claimant admitted that he intentionally lied about his consumption of alcohol on the day of the accident. Claimant testified that he woke up hung over on the date of the accident and consumed 7 beers prior to reporting to work. After he got to work, he consumed another beer that he had poured into a QuikTrip mug. Claimant admitted that he consumed a total of 8 beers on the morning of the accident. Claimant also acknowledged that he was quite a drinker back when the accident occurred on November 18, 1992.

The Appeals Board is mindful that even if claimant is found to have been intoxicated at the time of the accident, respondent must still prove claimant's injury was substantially caused by the intoxication. The respondent supplied Curtis D. Klaassen, Ph.D., Professor of Pharmacology and Toxicology at the University of Kansas Medical Center, with claimant's hospital records and claimant's deposition that was taken July 9, 1993. In a report dated May 18, 1995, which was admitted into evidence at the preliminary hearing, Dr. Klaassen opined that the claimant was extremely intoxicated at the time of his accident. He also opined that the intoxicated state of the claimant was a major factor resulting in his work-related accident. Claimant's blood alcohol level at the time of his accident was more than twice the legal limit in Kansas of .10 percent to operate a motor vehicle. K.S.A. 1992 Supp. 8-1567. The emergency room doctor who examined the claimant smelled the odor of alcohol and, further, observed that the claimant appeared slightly intoxicated at the time

of his examination. Dr. Klaassen's expert opinion is that the major factor resulting in claimant's accident was his intoxication. Accordingly, the Appeals Board finds from the whole preliminary evidentiary record that claimant was intoxicated at the time of his accident and that such intoxication substantially caused his injuries. See Poole v. Earp Meat Co., 242 Kan. 638, 750 P.2d 1000 (1988).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Steven J. Howard dated March 14, 1996 is reversed and the claimant is denied compensation benefits because claimant's injuries were substantially caused by his intoxication.

IT IS SO ORDERED.

Dated this ____ day of May 1996.

BOARD MEMBER

c: Steven C. Effertz, Independence, MO
Joseph R. Ebbert, Kansas City, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director